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BellSouth Telecommunications, Inc
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

joelle.phillips@bellsouth.com

May 11, 2004

Joelle J. Phillips
Attorney
615 214 6311
Fax 615 214 7406

TRA. DOCKET ROOM

VIA HAND DELIVERY

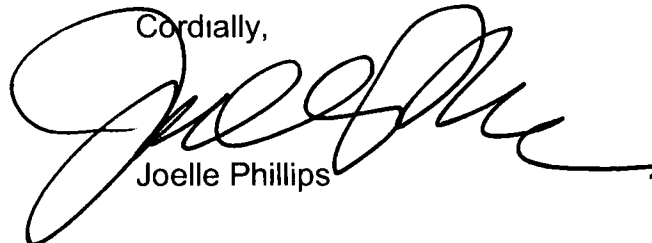
Hon. Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re *Petition of Cellco Partnership d/b/a Verizon Wireless for Arbitration Under
the Telecommunications Act of 1996*
Consolidated Docket No. 03-00585

Dear Chairman Tate:

Enclosed are the original and fourteen copies of BellSouth's *Motion to Quash in Part, or, in the Alternative, to Modify and Limit Subpoena*. Copies of the enclosed are being provided to counsel of record

Cordially,



Joelle Phillips

JJP:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition of Cellco Partnership d/b/a Verizon Wireless for Arbitration
Under the Telecommunications Act of 1996*

Consolidated Docket No. 03-00585

BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION TO QUASH IN PART, OR,
IN THE ALTERNATIVE, TO MODIFY AND LIMIT SUBPOENA

BellSouth Telecommunications, Inc. ("BellSouth") files this *Motion to Quash in Part, or, in the Alternative, to Modify and Limit Subpoena*, and respectfully shows the Hearing Officer as follows:

I. Procedural Facts

On May 4, 2004, the attached *Subpoena Duces Tecum* was issued to BellSouth, in connection with Docket No. 03-00585. BellSouth files this *Motion* to seek protection from undue burden associated with two out of the ten items requested in that subpoena.

In addition to the two specific items, BellSouth also objects to the general instructions in the subpoena requiring BellSouth to bring its original documents to the offices of Nashville attorneys Neal & Harwell. Many of the documents requested are quite voluminous and are regularly kept in the ordinary course of BellSouth's business in its Birmingham, Alabama offices. In order to avoid misplacement or destruction of BellSouth's originals, BellSouth proposes that it be allowed to either produce copies, if reimbursed for its reasonable copying costs, or

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to make the items available where they are ordinarily kept in Birmingham for copying by the requesting parties.

II. Legal Authority

The TRA issues subpoenas pursuant to Authority Rule 1220-1-3-.13, which authorizes subpoenas issued in accordance with the Tennessee Rules of Civil Procedure. Pursuant to Rule 45.02 of the Tennessee Rules of Civil Procedure, a court (or in this instance, the TRA) may modify or quash a subpoena "if it is unreasonable or oppressive." Tenn. R. Civ. P. 45.02. Tennessee Rule of Civil Procedure 45.02 differs from Rule 45 of the Federal Rules of Civil Procedure, on which the state law of procedure is patterned, in that it does not list specific circumstances when a motion to quash must be granted. Nor does the Tennessee rule define what is "unreasonable or oppressive." However, Tennessee courts generally look to the interpretation of the federal rules when interpreting the Tennessee Rules of Civil Procedure. Accordingly, whether a production request is "unreasonable or oppressive" should be determined by the same factors which establish an "undue burden" under the federal rule. *See Estes v. Good*, 1990 Tenn. App. LEXIS 415 (Tenn. App. 1990).

The Federal Rules of Civil Procedure outline circumstances in which a motion to quash may or must be granted.¹ The rule contains several specific reasons to

¹Federal Rule of Civil Procedure 45(c)(3) states.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of

grant a motion to quash, as well as a catch-all provision, allowing the court to quash a subpoena if the production would impose an "undue burden." Under federal case law construing this rule, determination of whether a subpoena is unduly burdensome, depends upon the following factors:

- (1) the breadth of the document request,
- (2) the time period covered by it,
- (3) the particularity with which the documents are described,
- (4) the burden imposed,
- (5) the relevance, and
- (6) the need of a party for the documents.

See American Elec. Power Co., Ins. v. U.S., 191 F.R.D. 132, 136 (S.D. Ohio 1999). *See also Flatow v. Islamic Republic of Iran*, 201 F.R.D. 5, 8 (D.D.C. 2001); *Alexander v. FBI*, 186 F.R.D. 21, 34 (D.D.C. 1998). In evaluating the burden imposed by the subpoena, the Court may also consider whether the request

this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions

Fed. R. Civ. P. 45(c)(3)

is cumulative and duplicative and the time and expense required to comply with the subpoena. See *Linder v. Calero-Portocarrero*, 183 F.R.D. 314, 319 (D.D.C. 1998).

In addition, as a general matter, the "fact of nonparty status may be considered by the court in weighing the burdens imposed in the circumstances." *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993); see also *American Standard, Inc. v. Pfizer Inc.*, 828 F.2d 734, 738 (Fed. Cir. 1987) (affirming district court's restriction of discovery where nonparty status "weigh[ed] against disclosure"); *Allen v. Howmedica Leibinger, GmbH*, 190 F.R.D. 518, 521 (W.D. Tenn. 1999) (non-party "entitled to consideration of its nonparty status as one factor in analysis of the burdens imposed upon it by compliance with [plaintiff's] subpoena"); *American Elec. Power Co., Ins. v. U.S.*, 191 F.R.D. 132, 136 (S.D. Ohio 1999) ("...the status of a person as a non-party weighs against disclosure [of the documents sought]."); *Wyoming v. U.S. Dep't of Agric.*, 2002 U.S. Dist. LEXIS 12829, * 8 (D.D.C. July 9, 2002) ("Non-party status is one of the factors the court uses in weighing the burden of imposing discovery."); *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 51 (S.D.N.Y. 1996) (non-party should not be subject to the same burden of production that rests on a party to the underlying litigation); *Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163, 179 (E.D.N.Y. 1988) (nonparty status a significant factor in determining whether discovery is unduly burdensome).

III. Application of Authority to the Present Case

The subpoena includes ten (10) separate requests for items. BellSouth objects to, and seeks modification of, two (2) of those ten (10) items.

A. Item 2 Requested by the Subpoena

BellSouth objects and seeks protection with respect to Item 2 of the request for production which requires BellSouth to produce "copies of all other agreements, contracts and documents between BellSouth and each CMRS provider covering the period from August 8, 1996 to the present."

Several relevant factors identified in the legal authority cited above counsel against requiring BellSouth to provide all of the broadly-described information, as requested in to this item. First, the request is extremely broad in that it is not limited to only those CMRS providers doing business in Tennessee and it is not limited in any respect regarding the subject matter of the agreements sought. BellSouth enters into agreements with CMRS providers relating to various topics that are wholly unrelated to any issue in the pending arbitration. For example, BellSouth and Cingular have agreements with respect to BellSouth's work as a sales agent for Cingular. Similarly, BellSouth and CMRS providers have numerous agreements relating to cell towers and real property leases or easements associated with such towers. The requesting party has made no attempt to tailor the request to agreements specifically relating to some particular topic. Second, the subpoena covers a substantial time period, requesting documents going back to 1996. This eight-year span is also unreasonably broad. Third, the request does not attempt to describe the documents with any particularity. Instead, the request refers generally to "all other agreements, contracts and documents between

BellSouth and each CMRS provider." Fourth, BellSouth believes that much of the material (as described above) that would be responsive does not relate in any fashion to the pending docket. Accordingly, such materials are not relevant to the pending docket.

In light of the foregoing issues, BellSouth urges the Hearing Officer to limit Item 2 to copies of all contracts, entered into from January 1, 2000 to the present, between BellSouth and each CMRS provider in Tennessee relating to transit traffic issues. BellSouth is prepared to produce such documents.

B. Item 3 Requested by the Subpoena

BellSouth seeks protection with respect to Item 3 of the *Subpoena* which requests BellSouth to produce

copies of all correspondence or any other documented communication between BellSouth and each CMRS provider (including but not limited to correspondence between counsel) that address, discuss or refer to "meet point billing" or any interconnection arrangement that is associated with traffic terminated on a rural independent network or discusses in any way the issues in this proceeding or the arbitration involving the CMRS providers in the Rural Independent Coalition.

BellSouth objects that production of the materials included in this broad request would be unduly burdensome.

Again, this request is extremely broad. BellSouth exchanges numerous communications with CMRS providers in the course of discussing or negotiating interconnection agreements. Review of all such documents in order to produce the requested material would literally take several months, requiring BellSouth personnel to comb through the work files associated with each and every

interconnection agreement into which BellSouth has ever entered with any CMRS provider. Additionally, BellSouth communicates to CMRS providers substantial information relating to traffic subject to Meet Point Billing (110101 records), which would also be responsive to the request. Production of such documents would also be extremely burdensome and time consuming given their voluminous nature.

As with Item 2, these documents are of questionable relevance. The interconnection agreements themselves, not communications relating to negotiations, govern the relationship between BellSouth and the CMRS providers. The communications could range widely in topic or subject matter. The requesting party has failed to describe with particularity any specific subject and has chosen instead to describe the communication sought as broadly as possible by seeking every communication relating to an "interconnection arrangement." Even this broad description is unhelpful in that the term "interconnection arrangement" has not been defined.

BellSouth does not object to providing correspondence or documented communications between BellSouth and any Tennessee CMRS provider relating to this docket and urges the hearing officer to so limit and modify the request.

IV. Conclusion

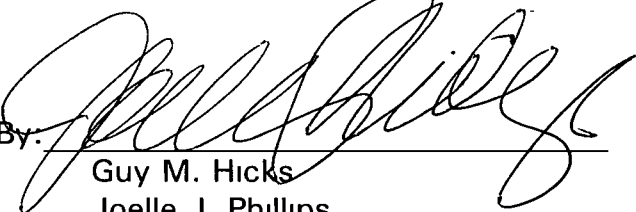
As noted above, BellSouth is in the process gathering responsive documents, and seeks protection regarding only two of the ten separate requests. BellSouth is mindful of the needs of parties to the arbitration, particularly the interest, often cited by the CMRS providers, in avoiding undue delay of the arbitration. Requiring BellSouth to provide all documents responsive to the two

requests at issue would require substantially more time than the eleven (11) days provided. Particularly in light of the questionable relevance of much of the requested material, it would be unreasonable to delay the progress of the docket in order to force BellSouth to produce all documents responsive to these two needlessly-broad requests.

BellSouth respectfully urges the Hearing Officer to modify the subpoena as requested above, on the basis that the requests addressed above are too broad, cover too large a period of time, fail to state with sufficient particularity items to be produced, impose undue burden, and seek items of questionable relevance. Moreover, BellSouth is entitled to consideration of its non-party status as an additional factor weighing in favor of this Motion. All of these factors, recognized by federal courts as noted above, support the relief BellSouth seeks.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

Guy M. Hicks
Joelle J. Phillips
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2004, a copy of the foregoing document was served on the parties of record, via the method indicated:

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Russ Mitten, Esquire
Citizens Communications
3 High Ridge Park
Stamford, CT 06905
Rmitten@czn.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Mark J. Ashby
Cingular Wireless
5565 Glenridge Connector, #1700
Atlanta, GA 30342
mark.ashby@cingular.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Marin Fettman, Esquire
T-Mobile, USA, Inc
12920 SE 38th Street
Bellevue, WA 98006
marin.fettman@t-mobile.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Jon E. Hastings, Esquire
Boult, Cummings, et al.
P. O. Box 198062
Nashville, TN 37219-8062
jhastings@boultcummings.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Henry Walker, Esquire
Boult, Cummings, et al.
P. O. Box 198062
Nashville, TN 37219-8062
hwalker@boultcummings.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

James Wright, Esq.
United Telephone - Southeast
14111 Capitol Blvd.
Wake Forest, NC 27587
james.b.wright@mail.sprint.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Clay Phillips, Esquire
Miller & Martin
150 4th Avenue, #1200
Nashville, TN 37219
cphillips@millermartin.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Martha Ross-Bain, Esquire
AT&T
1200 Peachtree St., NE
Atlanta, GA 30309
Ross-bain@att.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Donald L. Scholes, Esquire
Branstetter, Kilgore, et al.
227 Second Ave., N
Nashville, TN 37219
dscholes@branstetterlaw.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Timothy Phillips, Esquire
Office of Tennessee Attorney General
P O Box 20207
Nashville, TN 37202
Timothy.phillips@state.tn.us

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Bill Ramsey, Esquire
Neal & Harwell, PLC
150 Fourth Avenue North, #2000
Nashville, Tennessee 37219-2498
ramseywt@nealharwell.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Stephen G. Kraskin, Esquire
Kraskin, Lesse & Cosson, LLP
2120 L Street NW, Suite 520
Washington, D.C. 20037
skraskin@klctele.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

J Gray Sasser, Esquire
Miller & Martin LLP
150 Fourth Ave., N., #1200
Nashville, TN 37219-2433
gsasser@millermartin.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Suzanne Toller, Esquire
Davis Wright Tremaine LLP
One Embarcadero Center, #600
San Francisco, CA 39111-3611
suzannetoller@dwt.com

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Beth K. Fujimoto, Esquire
AT&T Wireless Services, Inc.
7277 164th Ave., NE
Redmond, WA 90852
Beth.fujimoto@attws.com

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight
- ☒ Electronic

Elaine Critides, Esquire
Verizon Wireless
1300 I Street, NW, #400W
Washington, DC 20005
elaine.critides@verizonwireless.com

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight
- ☒ Electronic

Paul Walters, Jr., Esquire
15 E. 1st Streets
Edmond, OK 73034
pwalters@sbcglobal.net

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight
- ☒ Electronic

Monica M. Barone, Esquire
Sprint Spectrum
6450 Sprint Parkway
Overland Park, KS 66251
mbaron02@sprintspectrum.com

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight
- ☒ Electronic

Mr. Tom Sams
ClearTalk
1600 Ute Avenue
Grand Junction, CO 81501
toms@cleartalk.net

